IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5940 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HB THAKKAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5940 of 1999

MR PARESH UPADHYAY for Petitioner No. 1

MR N.D.GOHIL, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 17/09/2003

ORAL JUDGEMENT

Heard learned advocate Mr. Paresh Upadhyay for petitioner and learned AGP Mr. N.D.Gohil appearing on

behalf of respondent.

2. At the time of hearing Mr. I.S.Parmar, Section Officer from the respondent Department is also remained present to assist learned AGP Mr. N.D.Gohil. The brief facts of the present petition are as under.

2.1 According to the petitioner he was appointed as Accounts Officer Class-I as direct recruit on 1.1.1968 and, on the same day, one Mr. J.M.Gor was also appointed as Accounts Officer Class-II along with the petitioner. On 16.1.1985, Government has published seniority list wherein petitioner was shown junior to Shri Gor against which the petitioner had grievance. Thereafter, petitioner was promoted on the post of Deputy Director along with Shri Gor keeping the dispute regarding seniority of the petitioner vis-a-vis Shri Gor, as it is. On 16.7.1987 Shri Gor was promoted as Joint Director ignoring the claim of the petitioner and, thereafter, on 16.10.1989, the petitioner was promoted as Joint Director and on 12.3.1990 Shri Gor was promoted as Director. According to the petitioner, the dispute and difference in respect to the seniority between the petitioner and Mr. Gor in the cadre of Accounts Officer Class-I was decided and accepted by the State Government. On 29.5.1992 Government has published provisional seniority list of Accounts Officer Class-I wherein the petitioner was shown senior to Mr. Gor. On 27.9.1994 the above list was finalised as it is, that is, the petitioner was finally declared senior to Mr. Gor as Accounts Officer Class-I. According to the petitioner, when Mr. Gor was promoted on the post of Joint Director on 16.7.1987, for that, a representation was made by the petitioner with a prayer to grant deemed date of promotion in the cadre of Joint Director w.e.f. 16.7.1987 and deemed date on the post of Director w.e.f. 12.3.1990 when Mr. Gor was promoted on the post of Director. The said request of the petitioner was not accepted by the department and ultimately, Special Civil Application No. 5663 of 1995 was filed by the petitioner before this Court. During the pendency of the said Special Civil Application, on 12.9.1995 the State Government had accepted the claim of the petitioner regarding deemed date of promotion for the post of Joint Director and passed an order granting the said benefit notionally to the petitioner w.e.f. 16.7.1987 and thereafter on 18.3.1996 the said Special Civil Application was finally decided by this Court and partly allowed while granting the actual benefit of the deemed date of promotion in the cadre of Joint Director w.e.f. 16.7.1987 and even arrears of pay was ordered to be paid and, thereafter, question of granting the deemed

date on the post of Director has been left open for the Government. Thereafter, the Letters Patent Appeal was filed in respect with respect to the latter part of the judgement being L.P.A. No. 744 of 1996. In L.P.A. the Division Bench of this Court has made it clear that for getting the deemed date of promotion petitioner can take appropriate steps in accordance with law. Thereafter, on 26.7.1996 the petitioner was promoted as Director but the claim of the petitioner for deemed date w.e.f. 12.3.1990 on the post of Director has been rejected by the State Government on 19.8.1996. On 9.7.1999 the L.P.A. came to be disposed of by the Division Bench keeping open the right of the petitioner to challenge the denial of the Government regarding the deemed date of promotion on the post of Director.

3. Affidavit-in-reply has been filed by one Mr. Hasmukhbhai R. Patel, Deputy Secretary, Finance Department against the present petition. Three contentions have been raised by the respondent in the affidavit-in-reply. First is that, in 1985 seniority list, the petitioner was junior in comparison to Mr. Gor and when Mr. Gor was promoted, the principle of selectivity was taken into account and therefore, considering Mr. Gor being senior, the case of the petitioner was not considered by the department. A detailed affidavit-in-reply including the contention of delay in challenging the action of the department was also raised by the respondent. The relevant averments made in the reply relates to the facts of this case are narrated at page 56. According to the respondent, out of five seniormost officers as per seniority list dated 16.1.1985 whose performance was assessed, one Mr. J.M.Gor was recommended by the Departmental Promotion Committee (top level) in their meeting held on 15.1.1990. Accordingly, Mr. Gor was promoted to the post of Director w.e.f. 12.3.1990. It is also made clear by the respondent in further averments that seniority of Accounts Officer Class-I and Class-II which was fixed as per the directives of the Court and persons who were in service as on 31.12.1964 and who had completed five years service as on that date were to be considered for initial composition and, on that basis, the seniority list of 16.1.1985 was prepared by the department. Due to these persons from Class-II who had completed 5 years were considered and thereby Class-II officers were appointed as Class-II in 1968 (Mr. Gor was one of them) were getting seniority over Class-I direct recruitee (the petitioner was one of them). So far as seniority list dated 16.1.1985 is concerned, the petitioner was shown at S.No. 41 and the person who was stated to have promoted

earlier (Mr. Gor) on the post of Joint Director and Director was at S.No.31. Therefore,it was made further clear by the respondent that his consideration was on account of his zone of consideration top among all the five considered for promotion as on 15.1.1990. The further averment made that the action taken by the respondent for determining the issue of promotion in light of the seniority list dated 16.1.1985 which was in force as on March' 1990 and by application of principle of selectivity while considering the promotion to Shri Gor was in order. The further averment is also made that the Departmental Promotion Committee met for the said purpose on 25.3.1992 for selection to the post of Director, suggested to adopt the new seniority list of Accounts cadre which was to be published in place of the then seniority list dated 16.1.1985. The Committee further recommended to make a fresh selection of an officer for the another post of Director (Director of Pension and Provident Fund) in place of an officer earlier selected on the basis of seniority list dated 16.1.1985 and in light of the seniority list which was to be published after the provisional seniority list which was published on 29.5.1992. The Departmental Promotion Committee again held their meeting to consider selection two posts of Heard of Department, eight names were required to be considered for selection of the above two posts, as per instructions issued by the Government. The name of the petitioner was also included in the said name and the Committee had considered all the eight names of the seniormost officers of the level of Joint Director (Accounts cadre) from the then newly published seniority list dated 29.5.1992 (the list in which the petitioner became senior to Mr. Gor). All the eight were considered for inclusion and performance were assessed and the Committee in their minutes dated 18.4.1994 has specifically noted that the Committee had assessed the overall performance of the said eight officers and categorized them in light of the instructions contained in the Government Resolution, General Administration Department dated 20.5.1978 (instructing the Secretariat Departments to follow the principle of selectivity) and, keeping in view the selection criteria for such posts, the Committee had recommended the following two names for their inclusion in the panel for promotions to the post of two Director:

(i) Mr. G.M.Gor (selected earlier in light of earlier seniority list reconsidered again in light of the new seniority list as per the suggestion of the D.P.C.)

(ii) Mr. S.U.Jani

Thus, out of two, the post of Director of Pension and Provident Fund filled on 12.3.1990 was again taken up for reconsideration according to the new seniority list dated 29.5.1992 wherein the petitioner was shown senior to Mr. Gor. According to the respondent that D.P.C. has not found fit the petitioner for the post of Director when the Committee was met on 18.4.1994. According to the respondent petitioner is not having any vested right of promotion and his case was fully considered giving due weightage to his seniority and also considering the principle of selectivity it was prevailing since long and therefore, the contention which was raised by the petitioner against the seniority list dated 16.1.1985 is not correct.

4. The averments made in para 5 of the reply are relevant and important. The prayer of the petitioner for deemed date of promotion for the post of Joint Director and thereafter for the post of Director w.e.f. 12.3.1990 has been considered by the respondent department. The answer given by the respondent in reply is that considering the first demand during the pendency of the petition the Government has accepted the claim of deemed date of promotion to the post of Joint Director and orders were issued on 12.9.1995 giving the benefit. However, as regards the second demand for deemed date of promotion for the post of Director, the respondent has relied upon the observations made by this Court in earlier petition filed by the petitioner. This Court has considered that in respect of the criteria to be adopted for deemed date of promotion to the post of Director which is considered to be a premature and matter has been left to the Government. Then, petitioner had filed L.P.A. No. 744 of 1996 which ultimately the Division Bench of this Court has kept open the right of the petitioner to challenge the grievance against the deemed date for the post of Director w.e.f. 12.3.1990. The defence which has been taken by the respondent about that selectivity criteria which is not incorporated in the rules, the answer given by the department is that it is not necessary to insert said principles in the statutory rules. Therefore, according to the respondent, in light of the general instructions to all the Secretariat Department, the said circular dated 20.5.1978 is binding to all the respective departments.

5. Learned advocate Mr. Paresh Upadhyay appearing on behalf of the petitioner has submitted that once the department has accepted the seniority of the petitioner

and given deemed date w.e.f. 16.7.1987 by order dated 12.9.1995 and the petitioner has been considered to be senior to Mr. Gaur, in light of this order or considering being a base, petitioner is entitled deemed date in the cadre of Director w.e.f. 12.3.1990. At that time when Mr. Gor was promoted the case of the petitioner was not considered by the Departmental Promotion Committee because at the relevant time the seniority list of 16.1.1985 was only taken into account and from that list only five senior officers were considered by the Departmental Promotion Committee in which the petitioner was not considered as he was not come within the five officers those who are senior, has been considered by the Department Promotion Committee because in the seniority list of 16.1.1985 petitioner was at S.No.41 and Mr. Gor was at S.No.31. Therefore, Mr. Paresh Upadhyay has submitted that the principle of selectivity which has been relied by the department on the basis of the Government Circular dated 20.5.1978 is contrary to the statutory rules and statutory rules of the year 1961 only fixed the criteria of proved merits and efficiency, except that no other criteria has been fixed under the statutory rules. He also submitted that any administrative instructions or directions contrary to the statutory rules having no legal effect and same cannot be implemented against the statutory rules. Mr. Paresh Upadhyay has further submitted the principle of selectivity has been incorporated by way of notification dated 6.1.1994 where the principle of selectivity for the post of Director has been considered. Therefore, before 6.1.1994 the promotion was given to Mr. Gor w.e.f. 12.3.1990 on the basis of the decision of the Departmental Promotion Committee which was met on 15.1.1990. Therefore, according to him petitioner is entitled the deemed date in the cadre of Director w.e.f. 12.3.1990 when Mr. Gor was promoted on the post of Director.

6. Learned AGP Mr. N.D.Gohil with the assistance of Mr. I.S.Parmar, Section Officer has emphasized that petitioner is not entitled the deemed date w.e.f. 12.3.1990 because at the relevant time the Departmental Promotion Committee has considered the seniority list of 16.1.1985 wherein the petitioner was not senior to Mr. Gor, therefore, he was not considered by the Departmental Promotion Committee met on 15.1.1990. Learned AGP Mr. Gohil has also further submitted that on 18.4.1994 again the Departmental Promotion Committee was met wherein the case of the petitioner was considered but according to the Committee he was not found fit for the promotion. Therefore, according to the learned AGP Mr. Gohil, the

principle of selectivity, based on Government Resolution dated 20.5.1978 has been rightly applied while selecting Mr. Gor on the post of Director and promotion was rightly given to Mr. Gor on 12.3.1990 when petitioner was junior according to the seniority list dated 16.1.1985. Therefore, learned AGP Mr. Gohil has submitted that petitioner is not entitled the deemed date w.e.f. 12.3.1990 though his case was considered for deemed date for the post of Joint Director by order dated 12.9.1995. According to his submissions petition is required to be dismissed.

7. I have considered the submissions made by both the learned advocates. It is necessary to note one important aspect that how this situation has occurred between the petitioner and Mr. Gor. It is necessary to note that petitioner was appointed as a direct recruitee on the post of Accounts Officer Class-I on 1.1.1968 and on the same date Mr. Gor was also appointed as Accounts Officer Class-II along with the petitioner. From the date of joining or appointment of petitioner and Mr. Gor, petitioner was appointed in Class-I and Mr. Gor was appointed in Class-II, then how Mr. Gor has been treated and considered throughout even more than 20 years being senior to the petitioner. The grievance has been raised by the petitioner all throughout against the seniority list of 16.1.1985 where the petitioner has been shown at S.No.41 and Mr. Gor has been shown at S.No.31. It is also necessary to note one important aspect that from 1.1.1968 to 16.1.1985 no promotion was given either to the petitioner or to Mr. Gor but both were promoted on 16.1.1985 to the post of Deputy Director. Even considering this situation as it is, how Mr. Gor become senior in the seniority list of 16.1.1985 in comparison to the petitioner, is still not explained by the respondent in their affidavit. In the entire affidavit no averments have been made by the respondent as to on what basis and considering which criteria Mr. Gor has become senior to the petitioner because both were appointed initially on different cadre, that is, one on Class-I and the other on Class-II which was the feeder cadre. Therefore, the entire exercise has been carried out by the respondent department relying upon the seniority list dated 16.1.1985 where Mr. Gor was considered senior to the petitioner and Departmental Promotion Committee which met on 15.1.1990 selected Mr. Gor for the post of Director. At that occasion the petitioner was not at all considered and his case was not examined by the Departmental Promotion Committee. But, looking to the subsequent development which was accepted by the respondent department by issuing order dated

12.9.1995 Mr. Gor was considered to be junior to the petitioner and on that basis deemed date on the post of Joint Director has been given to the petitioner w.e.f. 16.7.1987 instead of 16.10.1989. In the year 1990 when Departmental Promotion Committee was met on 15.1.1990, as per the reply submitted by the respondent, the case of Mr. Gor was considered on the basis of the seniority list dated 16.1.1985 but the case of the petitioner was not considered. At the relevant time recruitment rules and notification dated 30.12.1964 were in operation. The relevant provisions for the post of Gujarat Accounts Service Class -I (Senior Duty Posts) and Gujarat Accounts Service Class-I (Junior Duty Posts) are quoted as under:

"(A) Gujarat Accounts Service Class (Senior Duty Posts):-

Appointment is Gujarat Accounts Services Class-I (Senior Duty Posts) shall be made by promotion of officers of proved merit and efficiency who have worked for not less than three years in Gujarat Accounts Service, Class-I (Junior Duty Posts) or in a corresponding post.

(B) Gujarat Accounts Service Class-I (Junior Duty Posts):-

1. Appointment to Gujarat Accounts Service, Class-I (Junior Duty Posts) shall be made either:-

(i) By promotion of officers of proved merit and efficiency who have worked for not less than 3 years in Gujarat Accounts Service Class-II or in a corresponding post, and have passed such department examination as may be prescribed by Government.

(ii) By nomination in the ratio of all respectively.

(C) For being eligible for appointment by nomination the candidate must;

a) be not less than 25 years and unless already in the service of the Government, be not more than 35 years of age.

Provided that the upper age limit may be relaxed in favour of a candidate with exceptionally good qualification and/or

experience.

b) be a Chartered or Associate Chartered or incorporated or registered accounts and possess a degree in Arts, Science, Commerce or law at least in the commerce will be given preference, and;

c) possess atleast three years experience in Accounts and auditing in a responsible capacity in a commercial organisation or corporation or Board or a Government department.

Note: For the purposes of A and B above, the Government will in consultation with the commission decide which posts will be corresponding to the posts of Gujarat Accounts Service, Class-I (Junior Duty) and Gujarat Accounts Service Class-II respectively."

8. In view of the above statutory rules under Article 309 of the Constitution of India, the consideration was only of officers of proved merit and efficiency who have worked for not less than three years which is clear from the notification. The principle of selectivity was not included in the said rules. Thereafter, by another notification dated 6.1.1994, in Rule 5 for Class-A, the following has been substituted which is as under:

"(A) Gujarat Accounts Service, Class-I (Senior Duty Posts)

(i) Appointment to Gujarat Accounts service Class-I (Senior Duty Posts) mentioned under Category-C of Annexre-II appended to these rules shall be made by promotion of a person of proved merit and efficiency from amongst the persons working under Gujarat Accounts Service Class-I (Junior Duty Posts) and who have worked for not less than five years as such:

Provided that where the appointing authority is satisfied that a person having the experience specified above is not available for promotion and that it is necessary in the public interest to fill up a post by promotion even if a person having experience for a lesser period, it may, for reasons to be recorded in writing, promote such person who possess experience if a

period of not less than two thirds of the period specified above.

(ii) Appointment to Gujarat Accounts Service, Class-I (Senior Duty Post) mentioned under Category-B of Annexure-II appended to these rules shall be made by promotion of a person of proved merit and efficiency, from amongst the persons working under Gujarat Accounts Service Class-I (Senior Duty Posts) mentioned under Category-C of Annexure-II appended to these rules, and who have worked for not less then five years as such:

Provided that where the appointing authority is satisfied that a person having the experience specified above is not available for promotion and that it is necessary in the public interest to find up a post by promotion even if a person having experience for a lesser period, it may, for reasons to be recorded in writing promote such persons who possesses experience of a period of not less than two thirds of the period specified above.

(iii) Appointment to Gujarat Accounts Service, Class-I (Senior Duty Posts) mentioned under Category-A of Annexure-II appended to these rules, shall be made by promotion on units of principles of selectivity within the zone of consideration irrespective of seniority from amongst the persons working under category-B Gujarat Accounts Service Class-I (Senior Duty Posts) and who have worked for not less than three years as such:

Provided that where the appointing authority is satisfied that a person having experience specified above is not liable for promotion and that it is necessary in the public interest to fill up a post by promotion even if a person having experience for a lesser period, it may, for reasons to be recorded in writing promote such persons who possesses experience of a period of not less than two thirds of the period specified above.

In the said rules, for Annexure-II (A), the following shall be substituted, namely:-

Annexure-II (See Rule 3)

(A) Gujarat Accounts Service Class-I (Senior Duty Posts)

Category-A
1. Director

Category-B
1. Examiner
2. Joint Director

Category-C
1. Deputy Director
2. Deputy Examiner
3. Senior Treasury Officer
4. Pay and Accounts Officers

In the said notification dated 6.1.1994 wherein by Item No.(iii) states that appointment to Gujarat Accounts Service, Class-I (Senior Duty Post) mentioned under Category-A of Annexure-II appended to these rules, shall be made by promotion on units of principles of selectivity within the zone of consideration irrespective of seniority from amongst the persons working under Category-B Gujarat Accounts Service, Class-I (Senior Duty Posts) and who have worked for not less than three years as such. Therefore, it is very clear that prior to 1994 principle of selectivity for the post of Director was not in existence at all. The reliance which has been placed by the respondent relying upon the Government Circular dated 20.5.1978 where the principle of selectivity was required to be taken into account while giving promotion on the post of Director or Head of Department, is contrary to the statutory rules framed under Article 309 of the Constitution of India, meaning thereby that it was contrary to notification dated 30.12.1964. When Departmental Promotion Committee was met on 15.1.1990 relying upon the seniority list of 16.1.1985, this amended notification dated 6.1.1994 was not in existence and therefore to rely upon the principle of selectivity for selection to the post of Director is contrary to the statutory rules. Therefore, respondent has adopted the procedure or method for selection to the post of Director applying the principle of selectivity which is contrary to the service rules framed under Article 309 of the Constitution of India. Therefore, the contention which has been raised by the respondent in reply relying upon the Government Resolution dated 20.5.1978 cannot be accepted in light of the statutory rules framed by the Government under article 309 of the Constitution of India notification dated 30.12.1964.

9. The respondent has raised contentions in reply that there is delay in challenging the action of respondent by the petitioner. At the time of considering the case of Mr. Gor, the respondent has followed Government circular dated 20.5.1978 wherein principle of selectivity had applied. According to respondent when Departmental Promotion Committee met on 18.4.1994, the case of petitioner was also considered along with Mr. Gor but applying principle of selectivity as per Government Resolution dated 20.5.1978, petitioner was not found fit for the post of Director. Therefore, question arises that Government Resolution dated 20.5.1978 can apply even contrary to statutory rules when statutory rules dated 30.12.1964 framed under Article 309 of the Constitution of India. The said aspect has been considered by the Apex Court that if any administrative instruction is run to counter or contrary to statutory rules then such instruction is not having any legal effect and if any policy decision has not pass the test of Articles 14 and 16 of the Constitution of India is subversive of the doctrine of equality and it cannot sustain. In case of KAILASH CHAND SHARMA V. STATE OF RAJASTHAN AND OTHERS, 2002 AIR SCW 3276, the said aspect has been examined and relevant discussion in para 12 is quoted as under:

"The first and foremost question that would arise for consideration in this group of appeals is, whether the circular dated 10.6.1998 providing for bonus marks for residents of the concerned district and the rural areas within that district is constitutionally valid tested on the touchstone of Art. 16 read with Art. 14 of the Constitution? It is on this aspect, learned Senior Counsel appearing for the candidates concerned have argued at length with admirable clarity, making copious reference to several pronouncements of this Court. There can be little doubt that the impugned circular is the product of the policy-decision taken by the State Government. Even then, as rightly pointed out by the High Court, such decision has to pass the test of Arts. 14 and 16 of the Constitution. If the policy-decision, which in the present case has the undoubted effect of deviating from the normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well settled norms both positive and negative underlying Arts. 14 and 16, which together with

Art. 15 form part of the constitutional Code of equality."

Therefore, the Government Resolution or administrative instructions dated 20.5.1978 which runs counter to statutory rules cannot sustain in eye of law. The case of petitioner was rejected only on ground to applying Government Resolution dated 20.5.1978 where principle of selectivity had applied which is not in statutory rules. Petitioner had satisfied criteria as mentioned in statutory rules proved merits and efficiency. For that there is no denial or having any dispute by the respondent. The respondent had applied wrong principle and rejected the case of the petitioner which is contrary to service rules. By order dated 12.9.1995, the respondent has accepted the seniority of the petitioner as he being senior to Mr. Gor. Then same having effect on seniority list dated 16.1.1985 when petitioner was shown junior to Mr. Gor. Therefore DPC was met on 15.1.1990. The case of the petitioner was not considered only on the ground that he was junior to Mr. Gor and not come within five senior officers in zone of consideration. In such circumstances, similar case like present one has examined by the Apex Court in the case of DR. RAJINDER SINGH V. STATE OF PUNJAB AND OTHERS, (2001) 5 SCC 482. The relevant discussions in para 3 to 8 are quoted as under:

"(3) It is not disputed that service conditions of the appellant and Respondent 3 are governed by the statutory rules made in exercise of the powers conferred upon the Government under Article 309 of the Constitution which are known as the Punjab Civil Medical State Service (Class I) Rules, 1972 (hereinafter referred to as "the PCMS Class I Rules"). Rule 9 deals with the matters of recruitment and provides that recruitment to any post in service excepting the post of Director (Health Services), Joint Director (Health Services) and Deputy Director (Health Services) be made in the manner prescribed therein. Rule 9-A dealing with the appointment to the senior posts provides:

'Appointment to senior posts.-No person shall be appointed -

(a) to the post of Director, Health Services, unless he has an experience of working on the post of Joint Director, Health Services for a minimum of one year.

(b) to the post of Joint Director, Health Services, unless he has been a member of service for a minimum period of twelve years including two years as Deputy Director, Heath Services; and

(c) to the post of Deputy Director, Health Services, unless he has been a member of the service for a minimum period of ten years.'

(4) According to sub-rule(c) of Rule 9-A, a person cannot be appointed to the post of Deputy Director unless he has been the member of the service for a minimum period of 10 years. 'Service' has been defined as: 'Service means the Punjab Civil Medical (State Service Class I).'

(5) It has not been disputed before us that on the relevant date when Respondent 3 was recommended for promotion, he had not completed 10 years of service within the meaning of Rule 9-A read with Rule 2(2) of the PCMS Class I Rules. As Respondent 3 was not possessing the requisite qualifications on the relevant date, he could not be considered for promotion to the post of Deputy Director, Health Services.

(6) We do not agree with the High Court that even without amending the Rules, the respondent State could have declared PCMS Class II as PCMS Class I. The notification dated 9-4-1989 reads as:

'In pursuance of the recommendations of the Committee for the removal of anomalies in the revised scales of pay of Punjab Civil Medical Services, the President of India is pleased to declare PCMS (Class II) as PCMS (Class I). There will be only one service with the nomenclature of PCMS (Class I) with effect from 1-1-1986.

The necessary amendments in the service rules of PCMS (Class II) and PCMS (Class I) will be made separately.

This issue is with the concurrence of the Finance Department conveyed vide their ID No. 10/27/89-FPI, dated 20-3-1989.'

A perusal of the notification clearly indicates

that the Government itself was aware that the two classes of service cannot be equated or treated alike without amending the Rules. There is no dispute that the Rules have not been amended so far. The Departmental Promotion Committee, therefore, erred in recommending the promotion of Respondent 3, ignoring the Rules and only relying upon a notification.

(7) The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a government order and ignoring the mandate of Article 309 of the Constitution.

(8) As Respondent 3 was not eligible for consideration to the post of Deputy Director, Health Services, the Departmental Promotion Committee committed a mistake in recommending him. Consequent promotion of Respondent 3 on the basis of recommendation of the Departmental Promotion Committee being contrary to law is liable to be set aside."

Similarly, ad hoc promotion regularised with back date contrary to service Rules held to be invalid in case of SWAPAN KUMAR PAL AND OTHERS V. SAMITABHAR CHAKRABORTY AND OTHERS, (2001) 5 SCC 581. The relevant para 9 is quoted as under:

"So far as the third question is concerned, it is no doubt true that the respondents, who got their ad hoc promotion between the period 9-12-1982 to 7-1-1984, were later on found suitable in the test that was held and the result of the said test was published on 28-2-1985. It is also true that they had been continuing from their respective dates of ad hoc promotion till they were regularised, after being selected through

due process. But that by itself cannot confer a right on them to claim the ad hoc period of service to be tagged on for the purpose of their seniority inasmuch as there is no provision which says that an employee on being regularly promoted, such regular promotion would date back to the date of original promotion in the cadre, which might have been on ad hoc basis. When the service conditions are governed by a set of rules, in the absence of any rules, it is difficult to hold that regular promotion would date back to the date of ad hoc promotion itself. We, therefore, answer the question in the negative."

It is also settled law that when Government action or any administrative decision is contrary to good faith, justice or equity, then also Court can interfere with such decision, in the case of TANDON BROTHERS V. STATE OF W.B. AND OTHERS, (2001) 5 SCC 664. The relevant observation at page 683 is quoted as under:

"Governmental action must be based on utmost good faith, belief and ought to be supported with reason on the basis of the state of law - if the action is otherwise or runs counter to the same the action cannot but be ascribed to be mala fide and it would be a plain exercise of judicial power to countenance such action and set the same aside for the purpose of equity, good conscience and justice. Justice of the situation demands action clothed with bona fide reason and necessities of the situation in accordance with the law. But if the same runs counter, law courts would not be in a position to countenance the same."

In light of observations of the Apex Court the facts of the present case is also very clear. To deny promotion to the petitioner shown as junior to Mr. Gor itself is arbitrary when initially both were appointed on the same date 1.1.1968 but in different cadre Class I and Class II. The petitioner was appointed in Class I and Mr. Gor in Class II. Then on what basis Mr. Gor become senior to petitioner. The above exercise was made by the respondent to protect Mr. Gor and to deny the legal right of the petitioner. Therefore, action and decision of respondent Government is arbitrary and contrary to equity and good conscious.

The Apex Court has also considered that in

subordinate legislation the executive orders are issued governing statute must empower issue of administrative instructions to supplement the statutory rules but they should have to fill the gaps in the Rules and not be inconsistent with them. The said view has been taken in case of LAXMAN DUNDAPPA DHAMANEKAR AND ANOTHER V. MANAGEMENT OF VISHWA BHARATA SEVA SAMITI AND ANOTHER, 2002 SC (L&S) 63. The relevant observation made in para 9 is quoted as under:

> "We noticed earlier, the appointment and conditions of service of teachers in private government institutions are governed by the provisions of the Act and the statutory Rules. The said provisions are a self-contained code relating to the appointments of teachers in private-aided institutions. The field relating to method of appointment of regular teachers in a government-aided institution is fully covered by the provisions of the Act and the Rules and we do not find any provisions in the Act empowering the Government to supplement the Rules by executive instructions. It is no doubt true that if the Act had empowered the State Government to issue administrative instructions by way of supplementing the Rules, the position would be different. In such a case, the Government would have power to fill up the gaps in the Rules by issuing administrative instructions if the Rules are silent on the subject provided the same is not inconsistent with the statutory Rules already framed. In the present case, the Act does not empower the State Government to supplement the Rules by issuing administrative instructions or orders. In the absence of such provision in the Act, it is not open to the Government to supplement the Rules by executive orders. If we accept the argument of learned counsel for the respondent, it would be repugnant to Sections 3 and 15 of the Act.

In view of the above observations made by the Apex Court and considering the facts of the present case, here also, the State Government had issued administrative instructions on 20.5.1978 which is inconsistent with statutory Rules already framed because in the statutory Rules for considering the case of any employee for promotion, only proved merit and efficiency as well as three years service is required. By issuing administrative instructions some more test is provided which is not in the original statutory Rules and which

runs counter to the statutory Rules and therefore when statutory Rules is not giving any power to the State Government to issue any administrative instructions for implementing the statutory Rules then in absence of such power State Government is not empowered to issue such administrative instructions dated 20.5.1978 and applying only that instructions which was not in the statutory Rules, the legal right of petitioner to consider for the post of Director has been denied, that being contrary to the statutory Rules, equity and good conscious.

10. In view of the observations made by the Apex Court as referred above and in light of the order passed on 12.9.1995 in respect to the controversy between Mr. Gor and the petitioner about seniority is now no more in debate or in controversy because the State Government has accepted seniority of petitioner while giving deemed dated w.e.f. 16.7.1987 on the post of Joint Director on the date on which Mr. Gor was promoted to the post of Joint Director and arrears was paid to the petitioner for the period from 16.7.1987 to 16.10.1989 when the petitioner was promoted as Joint Director. Now, question is whether on the basis of the order dated 12.9.1995, when the seniority of the petitioner was accepted by the State Government, petitioner is entitled the same deemed date, that is, 12.3.1990 when Mr. Gor was promoted to the post of Director or not.

11. The respondent who has filed affidavit-in-reply has not made any averments against the petitioner in respect to confidential report or anything showing any adverse remarks against the petitioner in service record and therefore the presumption is that service record of the petitioner was clean at the time when the petitioner was entitled to be considered for promotion to the post of Director on 15.1.1990. On the basis of this fact, it is also necessary to consider that petitioner was promoted on 16.10.1989 on the post of Joint Director. If there was anything adverse against the petitioner in service record then there was no question of giving promotion to the petitioner on the post of Joint Director. Therefore, up to 16.10.1989, the presumption is that there is nothing adverse against the petitioner in service record and no indication has been made by the respondent in reply. Therefore, according to my opinion, the action of the respondent Department not to consider the case of the petitioner on 15.1.1990 when petitioner was entitled for consideration his case for promotion to the post of Director, is required to be set aside and petitioner is entitled to be considered at the relevant time on 15.1.1990 when case of Mr. Gor was considered

relying upon the seniority list dated 16.1.1985 which was subsequently revised by the respondent Department and in the year 1992 petitioner has been considered to be senior to Mr. Gaur. Therefore, considering this fact, according to my opinion at the relevant time the statutory rules which required proved merit and efficiency which has been proved by the petitioner at the time when he was promoted on the post of Joint Director on 16.10.1989 and now he is required to be given a deemed date on the post of Director w.e.f. 12.3.1990 which is in the same year, therefore, it makes no difference or require any further examination or scrutiny by the respondent department because at the time when the petitioner was promoted to the post of Joint Director, all exercise was done by the respondent Department. Therefore, according to my opinion, petitioner is entitled the deemed date w.e.f. 12.3.1990 when Mr. Gor was promoted by the respondent department.

12. In result, the present petition is allowed. The order dated 19.8.1996 wherein the request of the petitioner for deemed date w.e.f. 12.3.1990 was rejected by the respondent department is hereby quashed and set aside with a further direction to the respondent Government to give deemed date to the petitioner w.e.f. 12.3.1990 on the post of Director with all consequential benefits arising out of the said deemed date of promotion including the benefit of arrears of pay etc. The petitioner has already retired from service on 31.8.1999 from the post of Director, therefore, it is further directed to the respondent State Government to revise his pension after giving deemed date from 12.3.1990 and whatever difference of pension or arrears of pension which is required to be paid by the State Government, same will have to be paid to the petitioner within a period of three months from the date of receiving the copy of this order.

13. Considering the stand and defence of the respondent and the agony of the petitioner for number of years to get the justice about his legal right, according to my opinion petition is required to be allowed with costs which is quantifying at Rs.10,000.00 which is required to be paid by the respondent to the petitioner. Rule is made absolute.

(H.K.Rathod,J)

Jayanti*